

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of	)	CG Docket No. 02-278
1991	)	
	)	

**COMMENTS OF THE  
NEWSLETTER & ELECTRONIC PUBLISHERS ASSOCIATION**

**I. INTRODUCTION & SUMMARY**

The Newsletter & Electronic Publishers Association (“NEPA”) submits these comments in response to the Federal Communication Commission’s (“FCC”) Notice of Proposed Rulemaking (“NPRM”).<sup>1</sup> NEPA is a trade association representing publishers of approximately 3,000 newsletters and other specialized information services. Many of these publishers are small businesses or sole proprietorships publishing one or a handful of titles and NEPA’s members thus are – in a very real sense – the modern-day equivalent of Thomas Paine’s “lonely pamphleteers.” Collectively, members of NEPA publish on virtually every major subject of public concern, with titles ranging quite literally from A to Z: *Alabama Law Weekly* to *Journal of Healthcare Compliance* to the *Zoning Bulletin*. Newsletter journalists regularly report on a multitude of federal agencies, including the FCC, and newsletter journalists are accredited members of the Periodical Press Gallery in Congress, the White House press corps, and other such institutions, domestic and international.

Although any one newsletter may have a small subscription base when compared to that of a daily metropolitan newspaper, the typical subscriber depends upon a given newsletter for specialized, accurate and up-to-the-minute information and analysis of developments and trends in a focused area. Unlike mass circulation newspapers and magazines, many newsletters eschew advertising to better maintain their editorial

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<sup>1</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, Notice of Proposed Rulemaking, 67 Fed. Reg. 62667 (October 8, 2002).

integrity and therefore the survival of a given newsletter may be wholly dependent on maintaining its subscription base. In addition, and also in contrast to mass circulation publications, almost all newsletters serve business audiences rather than residential customers, with individual businesses themselves making up a significant portion of newsletter subscribers.

NEPA welcomes the Commission's re-examination of its regulations implementing the Telephone Consumer Protection Act ("TCPA").<sup>2</sup> While NEPA acknowledges the need for the FCC to regulate certain telemarketing practices, we offer these comments to help the Commission develop rules that will not interfere with the ability of newsletter publishers to communicate legitimately and effectively with subscribers and potential subscribers about their publications and services.

To that end, NEPA first wishes to endorse the comments that we understand have been separately filed in this proceeding on behalf of the Newspaper Association of America ("NAA"). Specifically, NEPA shares the NAA's belief that the FCC's current rules compelling affected companies to maintain internal "do not call" lists succeed in balancing the TCPA's directives to protect individuals' privacy rights and to avoid unnecessary burdens on businesses. A new national "do not call" list is therefore unnecessary. Second, with respect to the TCPA's regulation of advertising by facsimile, NEPA urges the FCC to formalize its so-called "established business relationship" exception in order that publishers may freely communicate with current and former business subscribers via facsimile.

## **II A NATIONAL "DO NOT CALL" LIST IS UNNECESSARY GIVEN THAT COMPANY-SPECIFIC LISTS ALREADY PROTECT CONSUMERS<sup>3</sup>**

In light of the volume of comments that the Commission is likely to receive pursuant to this NPRM, and wishing to avoid unnecessary repetition, NEPA limits its comments pertaining to a national "do not call" list to an endorsement of the comments filed by the NAA on this issue. Consistent with the NAA's position, NEPA firmly

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<sup>2</sup> 47 U.S.C. § 227; implementing regulations at 47 CFR § 64.1200.

<sup>3</sup> In accordance with the Commission's request, this comment separately addresses the issue of a national "do not call" list. See NPRM at ¶ 1, 67 Fed. Reg. at 62668.

believes that existing regulations requiring affected companies to maintain internal “do not call” lists succeed in protecting the right of consumers to avoid receiving unwanted telephone solicitations while not unduly burdening publishers who depend on telemarketing to promote their products and services. Should the FCC nonetheless decide to implement a national “do not call” list, NEPA urges that newspaper and newsletter publishers, who play a unique role among telemarketers in providing for an informed citizenry and who have a history of responsible telemarketing practices, be exempted from such a list. This is especially so with respect to business-to-business publishers – as are most of NEPA’s members – because customers are accustomed to receiving product and service information by telephone (including by facsimile) at their places of business. At a minimum, NEPA believes that the FCC should extend an “established business relationship” exemption to any national “do not call” initiative so that publishers are able to contact present and past subscribers.

### **III. THE COMMISSION SHOULD FORMALIZE THE “ESTABLISHED BUSINESS RELATIONSHIP” EXCEPTION TO THE UNSOLICITED FAX BAN**

NEPA further urges the FCC to formalize the “established business relationship” exception to the prohibition on unsolicited facsimile advertising. While the Commission has opined that such an exception exists, it has not formally adopted such a rule. As a result, publishers have no clear legal guidance as to whether they may market their products by facsimile, even to their own subscribers. The need for such guidance is particularly acute given that consumers who receive a single facsimile advertisement in violation of the TCPA are entitled to file private lawsuits in state courts.

Indeed, an increasing number of NEPA members, who have attempted to adhere to the FCC's opinion that sending facsimiles to those with whom they have an established business relationship does not violate the TCPA, have been sued or threatened with lawsuits by individuals who observe that the FCC's formal regulations in fact provide for no such exception.<sup>4</sup> These lawsuits, spurred in substantial part by the absence of a definition in the TCPA itself or in the FCC's implementing regulations as to what constitutes an "unsolicited" facsimile, have had a significant chilling effect on the use of facsimile advertising by publishers.

Furthermore, recognizing an established business exception would have little, if any, adverse impact on consumer privacy. On the contrary, direct-to-business facsimile communications, unlike forms of mass advertising, allow publishers to target those individuals most likely to be interested in their publications, *i.e.*, those individuals who have affirmatively expressed an interest by subscribing currently or in the past. In enacting the telemarketing portion of that TCPA, Congress observed that, where such a relationship exists, "consumers would be less annoyed and surprised by this type of unsolicited call since the consumer would have a recently established interest in the specific products or services." H.R. Rep. No. 102-317, at 14 (102nd Cong. 1st Sess. 1991). The same is equally true of facsimile advertising. In addition, current and former

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<sup>4</sup> In an effort to educate its members regarding their obligations under the TCPA, NEPA has retained outside counsel to conduct a series of seminars, produce published papers and conduct a "hotline" providing guidance to members on this topic. While NEPA has not to date undertaken a formal survey of its members' practices and experiences under the TCPA, the anecdotal evidence gathered by NEPA and its TCPA counsel indicate (i) that fax marketing is one of the most important forms of promoting newsletters; (ii) NEPA members strive to comply with the TCPA, and (iii) NEPA members are being sued or threatened with suit under the TCPA, often by subscribers whose subscriptions recently have lapsed (and, NEPA notes, such complainants appear to be represented by a small cadre of lawyers who specialize in TCPA claims).

subscribers who nevertheless object to such facsimile advertising would still be able to prevent it by requesting that they be placed on the publisher's internal do-not-call list.

Finally, it bears emphasis that marketing by facsimile is critical to the success of publications with a specialized focus, such as newsletters, because these publications have a more limited potential audience than do general interest, mass circulation publications. Targeted fax communication is among the least intrusive, most cost effective means for newsletter publishers to seek renewal requests from, or to market new publications and products to, their current and former subscribers. In the absence of a formal "established business relationship" exception, newsletter publishers are effectively required to contact entities with whom they already do business or have done business with in the past, via less effective means of communication, to obtain explicit authorization to send a facsimile seeking the renewal of a subscription. Not only is this particularly burdensome on "mom and pop" newsletter publishers with limited staffs and resources, it is also more burdensome on consumers themselves, which of course is precisely the opposite of the result intended by Congress in enacting the TCPA.

Respectfully submitted,

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